STATE OF MICHIGAN

COURT OF APPEALS

ELAINE A. HAAS and CHARLES J. BANNON,

Plaintiffs-Appellants/Cross-Appellees,

v

WADE H. DEAL and SARAH J. DEAL,

Defendants-Appellees/Cross-Appellants,

and

TRACEY L. DEAL and J. A. DELANEY & COMPANY,

Defendants-Appellees.

UNPUBLISHED
January 25, 2007

No. 262987
Wayne Circuit Court
LC No. 99-918983-CH

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's order awarding defendants Wade and Sarah Deal attorney fees and costs of $10,638.75 as a sanction for filing a frivolous action. Wade and Sarah Deal cross appeal, challenging the amount of sanctions awarded. Because we find the award of sanctions appropriate, we affirm the decision to award sanctions. However, we vacate the sanction award and remand for further proceedings regarding the amount of sanctions.

I. Underlying Facts

In 1998, plaintiffs purchased residential property from Wade and Sarah Deal. Plaintiffs made their written offer in October 1998, through Tracey Deal, the same real estate agent who also represented Wade and Sarah as sellers. The closing took place in December 1998. Shortly thereafter, plaintiffs learned that the wooded parcel of land abutting theirs was owned by a cemetery and that the cemetery planned to expand into the wooded area, very close to plaintiff's new home. In June 1999, plaintiffs filed the instant action against Wade and Sarah Deal, and against Tracey Deal and her employer, J. A. Delaney & Company. Plaintiffs' amended

complaint sought rescission of the purchase agreement or damages based on various theories of fraud and a claim that defendants violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*

In August 2000, the trial court granted separate motions for summary disposition brought by Wade and Sarah and by Tracey and J. A. Delaney & Company. In a prior appeal, this Court partially reversed the trial court's decision, finding that a genuine issue of material fact existed with regard to plaintiffs' theories that Tracey made a fraudulent misrepresentation regarding the planned cemetery expansion, that Wade made a fraudulent or innocent misrepresentation regarding the owner of the adjacent parcel and whether it would be developed, and that Tracey violated the MCPA. See *Haas v Deal*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2002 (Docket No. 230490). However, our Supreme Court subsequently reinstated the trial court's award of summary disposition in favor of Wade and Sarah on the ground that plaintiffs did not rely on Wade's alleged misrepresentations because they were made after plaintiffs entered into the purchase agreement. See *Haas v Deal*, 470 Mich 871; 688 NW2d 278 (2004). On remand, the case was assigned to a successor judge, who determined that Wade and Sarah were entitled to sanctions under MCL 600.2591, because plaintiffs' claims against them were frivolous. The court awarded Wade and Sarah attorney fees and costs of $10,638.75, substantially less than the $43,093.73 amount they requested.

II. Plaintiffs' Appeal

Plaintiffs challenge the trial court's decision to award sanctions in favor of Wade and Sarah. Because the trial court based its award only on MCL 600.2591(3)(a)(iii), we limit our review to a determination whether the trial court clearly erred in finding that plaintiffs' claims were devoid of arguable legal merit, looking to the circumstances existing at the time the claims were filed to evaluate their legal viability. *Jerico Constr Inc v Quadrants, Inc*, 257 Mich App 22, 35-36; 666 NW2d 310 (2003); *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A finding of fact is clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *Id*.

MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
> (3) As used in this section:
> (a) "Frivolous" means that at least 1 of the following conditions is met:
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
(iii) The party's legal position was devoid of arguable legal merit.

Here, the judge awarded sanctions because she found that plaintiff's claims against the Deals were devoid of arguable legal merit. Specifically, the trial court found that when plaintiffs had no contact with Sarah Deal whatsoever, the record did not reflect a basis for fraud or misrepresentation against her. The trial court also noted that the fact that the Supreme Court upheld the summary disposition order (based upon MCR 2.116(C)(8)) against Wade Deal would suggest there was no basis for a cause of action against Wade. Further, the trial court cited to this Court's decision in the prior appeal that a Michigan Consumer Protection Act (MCPA) cause of action was not viable where the Deals isolated sale of their home does not qualify as the Wade's engagement in trade or commerce as defined in the MCPA.

We find no clear error in the trial court's determination that plaintiffs did not have a legally viable fraudulent or innocent misrepresentation claim against Wade, based on Wade's alleged statements made *after* plaintiffs became bound by the purchase agreement. Plaintiffs have not shown that either rescission of the purchase agreement or damages was a viable legal remedy against Wade. Because plaintiffs' claim against Sarah is derivative of Wade's alleged fraud, it is unnecessary to address plaintiffs' claim that Sarah could also be liable for Wade's fraud, as his spouse and co-owner of the property. The trial court did not clearly err in finding that Wade and Sarah were entitled to sanctions with respect to Wade's alleged fraudulent statements.

With regard to plaintiffs' silent fraud claim against Wade and Sarah predicated on their seller disclosure statement, plaintiffs' failure to adequately brief the legally viability of their claim could preclude appellate review. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Regardless, we find no basis for disturbing the trial court's finding that plaintiffs' claim was devoid of arguable legal merit.

The crux of plaintiffs' claim of silent fraud is that the Deals executed a disclosure statement (the form for which is provided for at MCL 565.957) regarding property conditions in connection with the purchase agreement which indicated in "other items," ¶8, that Wade and Sarah were not aware of any "[f]arm or farm operation in the vicinity; or proximity to a landfill, airport, shooting range, etc." Although sanctions should not be imposed merely because a litigant's legal argument was rejected by a court, *Attorney General v Harkins,* 257 Mich App 564, 577;669 NW2d 296 (2003), considering the placement of the term "etc." in MCL 565.957, it could not have been reasonably construed to require Wade and Sarah to disclose the location of a cemetery, let alone the type of detail that plaintiffs sought with respect to the cemetery's expansion plans, or provide a basis to seek damages or rescission based on the nondisclosure. Inasmuch as an essential element of silent fraud is a legal duty to make a disclosure, there was no legally viable basis for plaintiffs' silent fraud claim. *Hord v Environmental Research Institute of Michigan (After Remand),* 463 Mich 399, 412; 617 NW2d 543 (2000); *M & D, Inc v McConkey*, 231 Mich App 22, 29-31; 585 NW2d 33 (1998).

With regard to plaintiffs' claim that Wade and Sarah could be held responsible for Tracey's alleged fraudulent misrepresentations, we agree with plaintiffs' position that, as a general rule, a principal may be liable for misrepresentations of his or her agent arising from the sale of property. *Groening v Opsata*, 323 Mich 73, 85; 34 NW2d 560 (1948). Nevertheless, plaintiffs have failed to show an arguable legal basis for concluding that this general rule applies to the facts at hand.

Plaintiffs alleged throughout their complaint that Tracey was acting as plaintiffs' agent in the transaction and, in that capacity, owed a duty to investigate and provide plaintiffs with information about the cemetery expansion parcel. Even in a dual agency situation that is consented to by both parties, the general rule that neither principal is responsible for the agent's representations has exceptions, although a principal will not be liable if a defrauded principal relies upon the agent's statements as those of his or her own agent. See *Boss v Tomaras*, 251 Mich 469, 472; 232 NW 229 (1930). Examined in this context, plaintiffs have failed to show that they had any arguable legal basis for holding Wade and Sarah responsible for the alleged misrepresentation by Tracey after they made the purchase offer on October 1, 1998.

While not dispositive of this issue, we believe that the factual development after the amended complaint was filed, coupled with this Court's cursory consideration of the agency issue in the prior appeal and our Supreme Court's failure to address it when reinstating the order of summary disposition, supports that plaintiffs' claim that Wade and Sarah were responsible for Tracey's alleged fraud was devoid of arguable legal merit when the claim was asserted in the amended complaint. Cf. *Davids v Davis*, 179 Mich App 72, 89-90; 445 NW2d 460 (1989) (trial evidence confirmed that counterclaim was frivolous). While not every error in a legal analysis constitutes a frivolous action, *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002), we are not left with a definite and firm conviction that the trial court made a mistake by allowing sanctions for plaintiffs' fraud theory that Wade and Sarah could be held liable for Tracey's alleged fraud.

Plaintiffs have also not demonstrated that the trial court clearly erred in finding that the MCPA claim again Wade and Sarah was devoid of arguable legal merit. Plaintiffs' reliance on *Klotz v Underwood*, 563 F Supp 335 (ED Tenn, 1982), aff'd 709 F2d 1504 (CA 6, 1983), is misplaced in light of the Tennessee Supreme Court's disagreement with that holding in *Ganzevoort v Russell*, 949 SW2d 293, 298 n 3 (Tenn, 1997). Further, plaintiffs have not shown that the reasoning in *Klotz* has any application to the MCPA. To the extent that plaintiffs suggest that there is an arguable public policy basis for holding Wade and Sarah liable for Tracey's alleged MCPA violation, we would note that a court's role is not to engage in judicial legislation, but to determine "the way that was in fact chosen by the Legislature." *Tyler v Livonia Pub Schools*, 459 Mich 382, 393 n 10; 590 NW2d 560 (1999).

Finally, despite plaintiffs' claim to the contrary, the successor judge's consideration of the predecessor judge's comments regarding sanctions does not demonstrate clear error, inasmuch as the record indicates that the successor judge made an independent determination that sanctions were warranted. It is clear that the successor judge was willing to consider plaintiffs' counsel's arguments, especially with respect to his claim that sanctions should not be awarded because plaintiffs had some success in the prior appeal before the Supreme Court reinstated the order of summary disposition in favor of Wade and Sarah. Further, while we agreed that the mere fact that a party does not ultimately prevail does not render a complaint

frivolous, *Kitchen v Kitchen, supra*, at 662, we are satisfied from the record that the successor judge did not find plaintiffs' action frivolous solely because they failed to prevail against Wade and Sarah.

Having considered plaintiffs' various challenges to the trial court's findings, we conclude that plaintiffs have not shown any basis for relief. The trial court did not clearly err in determining that plaintiffs' fraud and MCPA actions against Wade and Sarah were frivolous within the meaning of MCL 600.2591(3)(a)(iii).

III. Wade and Sarah's Cross Appeal

Wade and Sarah challenge the trial court's decision to award only $10,638.75 in sanctions, rather than the $43,093.73 amount they requested.

Our task as a reviewing court is to determine if the trial court abused its discretion in determining the amount of sanctions. *In re Costs & Attorney Fees, supra* at 104. The abuse of discretion standard recognizes that there will be circumstances in which more than one reasonable and principled outcome is possible. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If a trial court selects one of the principled outcomes, the trial court does not abuse its discretion and, thus, an appellate court may appropriately defer to the trial court's judgment. *Id.*

An award of sanctions under MCL 600.2591 must be reasonable. *In re Costs & Attorney Fees, supra* at 104. Under MCL 600.2591(2), "[t]the amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees." Although there is no precise formula for determining the reasonableness of attorney fees, the nonexclusive list of factors that are to be considered include: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 410; 700 NW2d 432 (2005), quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). But the trial court need not make detailed findings on each factor considered. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005).

Here, the trial court recognized the requirement of reasonableness and specifically found the hourly rate of $175 for attorney fees to be reasonable. But the only explanation given by the trial court for awarding only a portion of the attorney fees and costs requested by the Deals was its assessment of Tracey Deal's culpability in this case. Because Tracey had separate counsel, and the trial court's decision did not require any allocation of attorney fees and costs between defendants, the trial court did not reach a reasonable and principled outcome when determining that Tracey's culpability affected the amount of sanctions. Therefore, we vacate the sanction award of $10,638.75 in favor of Wade and Sarah, and remand for further proceedings to determine reasonable attorney fees and costs based on appropriate considerations.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto